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IN THE

Supreme Court of the United States

October Term, 1943

No. 797

THE STARR PIANO COMPANY, PACIFIC DIVISION, a corporation,

Petitioner,

vs.

ETHEL STRICKLAND ROGAN, Executrix of the Last Will of Nat Rogan, Deceased,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit and Brief in Support Thereof.

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Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit and Brief in Support Thereof.

To the Honorable the Supreme Court of the United States:

The Starr Piano Company, Pacific Division, a corporation, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered in the above entitled cause on December 27, 1943, reversing a decision of the District Court of the United States in and for the Southern District of California, Central Division.

Opinions Below.

The minute order and memorandum decision, as well as the findings of fact and conclusions of law and judgment of the United States District Court, Southern District of California, Central Division, are unreported, but are contained in the transcript of record, pages 41 to 46, inclusive. The opinion of the Circuit Court of Appeals [R. 59-67] is reported in 139 Fed. (2d) 671.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on December 27, 1943. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. § 347).

Statutes Involved.

In the appendix hereto are set forth the relevant statutory provisions:

Section 111 (a)(b)(c), Revenue Act of 1934, Appendix, page 1;

Section 112 (a)(b)(3)(4)(g)(1), Revenue Act of 1934, Appendix, pages 1 and 2;

Section 113 (a)(7), Revenue Act of 1934, Appendix, page 2;

Section 115 (c), Revenue Act of 1934, Appendix, pages 2 and 3;

Division First, Part IV, Title 1, Chapter XIII, Section 361 (1)(2)(3)(a)(b)(c)(d)(e)(f)(4)(5)(6)(7), of the Civil Code of California, Appendix, pages 3 to 7.

Statement of Facts.

The action below is an appeal from the decision of the United States District Court, Southern District of California, Central Division, in which judgment was entered on behalf of petitioner.

Petitioner is a corporation duly organized and existing under and by virtue of the laws of the State of California with principal place of business located in the County of Los Angeles [R. 2]. During the months of February and March, 1921, petitioner entered into two ninety-nine year leases covering property situated in the City of Los Angeles [R. 20]. During the month of May, 1922, petitioner caused the Gennett Realty Company, a corporation, to be incorporated under the laws of the State of California [R. 20]. The Gennett Realty Company was caused to be organized by petitioner for the purpose of holding legal title to the two leases it had acquired in February and March, 1921 [R. 20-21]. On July 17, 1922, petitioner transferred all its right, title and interest in the two leases aforesaid to Gennett Realty Company in exchange for all the capital stock of the latter [R. 21]. At all times during the existence of Gennett Realty Company petitioner owned all its issued and outstanding capital stock [R. 21]. On August 1, 1922, the Gennett Realty Company as lessor, and petitioner, as lessee, entered into a sublease of the property which petitioner had transferred to Gennett Realty Company. The lease was for a term of 15 years [R. 21]. During the year 1922 Gennett Realty Company issued its bonds in the amount of $200,000.00 for the purpose of raising funds to construct a building on one of the leases transferred to it by petitioner. The funds were actually raised and a building constructed [R. 21]. On July 1, 1923, Gennett Realty Company and petitioner as

lessors, entered into a sublease for a period of 25 years of the property on which the building aforesaid was constructed [R. 21]. On May 1, 1924, the sublease was extended to April 30, 1984. On May 1, 1924, Gennett Realty Company and petitioner, as lessors, entered into a sublease of the other property which petitioner had originally transferred to Gennett Realty Company, the term of the sublease being for a period of 60 years.

During the existence as a corporation of the Gennett Realty Company its directors and officers were persons employed by petitioner and who were actively engaged in activities carried on by petitioner. Gennett Realty Company had no office separate and apart from petitioner. Gennett Realty Company had no assets except the leases transferred to it by petitioner. Gennett Realty Company did not have a bank account. Gennett Realty Company had no employees other than its officers and directors who were employees of petitioner. All bookkeeping of the Gennett Realty Company was done by an employee of petitioner. All indebtedness of Gennett Realty Company was paid by check of the petitioner. All rentals due Gennett Realty Company were collected by a Los Angeles bank as trustee [R. 22-23].

For the years 1922, 1923 and 1924 petitioner and Gennett Realty Company filed separate corporate income tax returns. At all times during its existence, with the exception of the year 1934, Gennett Realty Company and petitioner filed consolidated corporate income and franchise tax returns. During the year 1934 petitioner transferred certain accounts to Gennett Realty Company to be collected in the name of Gennett Realty Company. Part of said accounts were collected in the name of Gennett

Realty Company. The uncollected accounts were transferred back to petitioner. Gennett Realty Company carried on no activities except as enumerated in this statement [R. 23].

During July and August, 1934, the Gennett Realty Company merged into petitioner. The merger was made in compliance with the provisions of Division First, Part IV, Title 1, Chapter XIII of the Civil Code of California.

The merger agreement was approved by the Board of Directors of Gennett Realty Company, the shareholders of Gennett Realty Company, the Board of Directors of petitioner and the shareholders of petitioner on July 31, 1934 [R. 27-34]. A certificate relating to the merger agreement was filed with the Secretary of State of the State of California on August 1, 1934, and the same certificate was filed with the County Clerk of the County of Los Angeles, in which county petitioner had its principal place of business on August 10, 1934 [R. 34-37]. A like certificate on the same dates was filed with the same officials on behalf of Gennett Realty Company [R. 23, 24, 25, 37-40].

Pursuant to the statutory merger all the assets of Gennett Realty Company became vested in petitioner and all liabilities of Gennett Realty Company were assumed by petitioner. All shares of stock of Gennett Realty Company, by virtue of the merger agreement, were surrendered to and cancelled by petitioner [R. 29-40].

The Commissioner of Internal Revenue determined that petitioner derived a taxable gain incident to the receipt by petitioner of property of Gennett Realty Company as a result of the statutory merger.

Decisions of District Court of the United States and United States Circuit Court of Appeals.

The District Court of the United States, Southern District of California, rendered judgment on October 3, 1942, in favor of the plaintiff for $73,557.08, plus interest, income and excess profits taxes for the year 1934 [R. 45-46]. The District Court held that plaintiff did not realize taxable gain by reason of the fact that in 1934, pursuant to an agreement of merger and consolidation under the California statutes The Starr Piano Company and its wholly owned subsidiary, Gennett Realty Company, both California corporations, were merged and consolidated into The Starr Piano Company. The United States Circuit Court of Appeals for the Ninth Circuit reversed the decision aforesaid of the District Court.

Question Presented.

Did The Star Piano Company realize a taxable gain by reason of the fact that during the year 1934, pursuant to an agreement of merger and consolidation under California statutes, The Starr Piano Company and its wholly owned subsidiary were merged and consolidated into The Starr Piano Company?

The additional question was also presented to both courts below of whether the corporate entity of the subsidiary should be disregarded for tax purposes but that question is neither here pressed nor presented.

Specification of Errors to be Urged.

The Circuit Court of Appeals erred:

(1) In deciding that the statutory merger and consolidation resulted in a liquidation of the subsidiary resulting in taxable gain within the meaning of Section 115(c) of the Revenue Act of 1934.

(2) In deciding that the statutory merger and consolidation was not controlled by Section 112(h) (3) of the Revenue Act of 1934 and hence gave rise to neither taxable gain nor loss.

(3) In its failure to decide that there was no sale or other disposition of property resulting in taxable gain or loss under and pursuant to Section 111 of the Revenue Act of 1934.

(4) In its failure to decide that there was no sale or other disposition of property resulting in taxable gain or loss under and pursuant to Section 22(a) of the Revenue Act of 1934.

(5) In reversing the decision of the United States District Court.

Reasons Relied on for the Allowance of the Writ.

1. The decision of the Circuit Court of Appeals herein is in direct conflict with the decision of the United States Circuit Court of Appeals of the Second Circuit in *Gutbro Holding Company v. Commissioner of Internal Revenue*, 138 Fed. (2d) 16.
2. The Circuit Court of Appeals has decided an important question of Federal tax law which has not been but should be settled by this Court.